1-9-2013

# State v. Alfaro Respondent's Brief Dckt. 38500

IN THE SUPREME COURT OF THE STATE OF IDAHO

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| STATE OF IDAHO,<br><br>Plaintiff-Respondent,<br><br>vs.<br><br>MICHAEL ALFARO,<br><br>Defendant-Appellant. | ) | NO. 38500<br><br>Canyon Co. Case No.<br>CR-2009-26795 |

# BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

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## STATEMENT OF THE CASE

### Nature of the Case

Michael Alfaro appeals his conviction for aid and abet first degree murder, two counts of aid and abet aggravated assault, and aid and abet unlawful discharge of a weapon at a residence.

### Statement of Facts and Course of Proceedings

The evening before August 14, 2004, Michael Alfaro met with Richard Alaniz. (Trial Tr., p. 566, L. 13 – p. 568, L. 20.) They drank beers and talked about how Alaniz's house had been the subject of drive-by shootings by the gang known as the Westside Lomas. (Trial Tr. p. 568, Ls. 6-9; p. 570, Ls. 16–23.) Then they started driving around "in case [they] ran into somebody, a rival gang." (Trial Tr. p. 568, Ls. 19-20.) Alfaro was behind the wheel. (Trial Tr., p. 568, Ls. 16-17.) Alfaro and Alaniz stopped at the house of Mario Flores, and picked up Arandu Maceda and Evan Musquiz. (Trial Tr., p. 568, L. 19 – p. 569, L. 18.) All four were associated with the gang known as the Eastside Locos. (Trial Tr., p. 570, L. 24 – p. 571, L. 9; p. 635, Ls. 6-12.)

The summer of 2004 was notorious for drive-by shootings between the rival gangs. (Trial Tr., p. 411, L. 21 – p. 413, L. 11.) That early morning of August 14, Alfaro, Alaniz, Maceda and Musquiz drove by a house where Javier Rodriguez – known to be Westside – lived. (Trial Tr., p. 572, L. 12 – p. 573, L. 14; p. 589, L. 21 – p. 590, L. 3; p. 51, Ls. 23-25.) Three people were outside, including Rodriguez and Sael Castillo. (Trial Tr., p. 34, Ls. 6-8; p. 572, Ls. 4-15.)

Alfaro slowed the car and turned out the lights. (Trial Tr., p. 33, Ls. 18-21; p. 572, Ls. 7-24.) Then Maceda and Alaniz fired weapons at the house, while Musquiz, only 13 at the time, ducked down in the car. (Trial Tr., p. 148, Ls. 13-17; p. 157, Ls. 5-14; p. 573, L. 7-14.) Rodriguez fired shots back. (Trial Tr., p. 34, Ls. 21-25.) A bullet penetrated the kitchen window of Rodriguez's house, and hit Carlos Chavez – who had gone inside for a snack – in the neck. (Trial Tr., p. 274, Ls. 23-25; p. 296, Ls. 13-23; p. 326, Ls. 4-7; p. 376, Ls. 4-6.) Alfaro sped away. (Trial Tr., p. 157, Ls. 9-14.) Rodriguez tried to stop Chavez's blood loss, and called 911. (Trial Tr., p. 74, L. 22 – p. 75, L. 6; p. 118, Ls. 1-9.) Chavez was taken to the emergency room, then later transported to Boise for surgery. (Trial Tr., p. 271, Ls. 4-5; p. 275, Ls. 11-12; p. 437, Ls. 20-23.) He died two weeks later. (Trial Tr., p. 271, L. 4 – p. 272, L. 15.)

Initially, no witnesses cooperated with definitive information. (Trial Tr., p. 383, L. 8 – p. 384, L. 11.) In June 2005, Musquiz came forward. (Trial Tr., p. 194, L. 1 – p. 195, L. 18.) The state filed its first indictments in August 2009. (R., pp. 6-11.) Ultimately, Alfaro was charged with four counts in the shooting incident that left Chavez dead: one count of aid and abet first degree murder or involuntary manslaughter; two counts of aid and abet aggravated assault; and one count of aid and abet unlawful discharge of a firearm at a dwelling house. (R., pp. 90-94.)

A jury found Alfaro guilty of aid and abet first degree murder or involuntary manslaughter, both counts of aid and abet aggravated assault, and aid and abet unlawful discharge of a firearm at a dwelling house. (R., pp. 143-45.) Alfaro was

sentenced to 20 years fixed with a subsequent indeterminate period up to life in prison on count one, five years fixed on count two, five years fixed on count three, and five years fixed on count four, each to run concurrently. (R., pp. 161-63.)

## ISSUES

Michael Alfaro states the issues on appeal as:

A. Did the prosecutor's misconduct in closing argument deprive Mr. Alfaro of his right to due process under the Fourteenth Amendment to the United States Constitution?

B. Was there constitutionally sufficient evidence to support the verdict?

C. Did the combination of errors and irregularities deprive Mr. Alfaro of his due process right to a fair trial?

D. Did the district court abuse its discretion and violate Mr. Alfaro's right to trial and due process by sentencing him more harshly for exercising his right to trial?

(Appellant's brief, pp. 9-10.)

The state rephrases the issues as:

1. Has Alfaro failed to demonstrate that the record from the five day trial lacks substantial and competent evidence to support the jury's findings and verdict?

2. Has Alfaro failed to show that prosecutorial misconduct, or any error or irregularity, infringed on his due process right to a fair trial?

3. Has Alfaro failed to establish that the district court imposed his sentence with intent to punish him for exercising his right to trial, thus denying him due process?

## ARGUMENT

### I.

### Alfaro Has Failed To Demonstrate That The Record From The Five Day Trial Lacks Substantial And Competent Evidence To Support The Jury's Findings and Verdict

In the summer of 2004, the violent rivalry between Eastside and Westside gangs in Caldwell, Idaho wrought a torrent of drive-by shootings. Michael Alfaro, Richard Alaniz, Arandu Maceda, and Evan Musquiz were Eastside. Javier Rodriguez, Sael Castillo, and Carlos Chavez were Westside. On August 14, 2004, the four Eastsiders did a drive-by of Rodriguez's house. Alfaro drove. Alaniz and Maceda fired weapons. Rodriguez fired back. Chavez was hit and killed. The story is simple.

Alfaro argues that the evidence is constitutionally insufficient to support his convictions. (Appellant's brief, pp. 13-16.) However, review of the record shows that the verdicts are supported by substantial and competent evidence.

#### A. Standard Of Review

Alfaro filed Rule 29 motions for acquittal both after the close of the state's case, and after the jury returned a guilty verdict. (Trial Tr., p. 620, L. 7 – p. 626, L. 1; R. 146-47.) The district court denied both motions. (Trial Tr., p. 626, Ls. 4-22; R. 148-54.) In reviewing the denial of a Rule 29 motion, the appellate court considers whether there was substantial evidence to support the factual findings and verdict below. State v. Hoyle, 140 Idaho 679, 684, 99 P.3d 1069, 1074 (2004). Evidence is substantial if "a reasonable mind could conclude that the

defendant's guilt as to such material evidence of the offense was proven beyond a reasonable doubt." Id. (citation omitted). Where there is competent but conflicting evidence sufficient to sustain the verdict, the appellate court will not reweigh the evidence or disturb the verdict. Id. Also, all reasonable inferences must be taken in favor of the prosecution. Id.

B. Ample Competent Evidence Through Witness Testimonies Supports The Jury's Factual Findings And Verdict Beyond A Reasonable Doubt

As outlined above, the facts in this case are straightforward. Testimonies of Alaniz and Musquiz demonstrate that they participated in a drive-by shooting in the early morning hours of August 14, 2004, in which Alfaro was the driver. (Trial Tr., p. 149, L. 6 – p. 157, L. 14; p. 567, L. 6 – p. 573, L. 24.) Alaniz testified that the house that they shot at was Rodriguez's. (Trial Tr., p. 573, L. 25 – p. 574, L. 18.) Castillo and Rodriguez testified that they were at Rodriguez's house that early morning when they were shot at, and Chavez was killed. (Trial Tr., p. 29, L. 1 – p. 34, L. 25; p. 109, L. 2 – p. 113, L. 18.) Those testimonies were consistent with that of Detective Scott, who responded to the call immediately following the shooting. (Trial Tr., p. 293, L. 18 – p. 301, L. 7.)

Alfaro argues that the evidence is insufficient to sustain the jury's findings and verdict; in support, he highlights differences in details of witness accounts, such as the vehicle's color, whether the vehicle turned around, or the exact time of the drive-by. (Appellant's brief, p. 13-16.) At best, Alfaro has established conflicts in the testimonies. But, absent a showing that evidence lacks

competence, conflicts provide inadequate basis to disturb a jury's factual findings. Hoyle, 140 Idaho at 684, 99 P.3d at 1074.

In this case, it is undisputed that the drive-by shooting occurred at night. (Trial Tr., p. 29, L. 1 – p. 34, L. 25; p. 109, L. 19 – p. 113, L. 18; p. 583, Ls. 1-3.) Most, if not all of those involved in the shooting had been drinking alcohol. (Trial Tr., p. 29, Ls. 5-19; p. 120, Ls. 1-5; p. 152, L. 20 – p. 153, L. 15; p. 568, Ls. 10-13.) And the shooting took place six years before the witnesses testified at trial. Given these factors, the variation in witnesses' details of the night is unremarkable.

Significantly, Alfaro acknowledges the jury properly concluded that Alfaro, Alaniz, Musquiz, and Maceda drove-by Rodriguez's house and fired shots "at some point in time." (Appellant's brief, p. 14.) Essentially, Alfaro concedes that the witnesses' testimonies as to the critical facts were competent. Alfaro then argues that the evidence does not show, beyond a reasonable doubt, that *his* drive-by shooting of Rodriguez's house was *the same* drive-by shooting that resulted in Chavez's death. (Appellant's brief, p. 14.) That the jury held no such lingering doubt is entirely reasonable. The testimonies of Alaniz, Musquiz, Castillo, Rodriguez, and Wright provided ample competent evidence for the jury to conclude – beyond a reasonable doubt – that Chavez was shot and ultimately killed in Alfaro's drive-by.

Alfaro has failed to demonstrate that there was insufficient evidence to support the jury's factual findings and verdict. The Court should thus reject Alfaro's first argument.

II.

Alfaro Has Failed To Show That Any Prosecutorial Misconduct, Or Any Error Or Irregularity Infringed On His Right To A Fair Trial

After Alfaro's counsel's closing statement, the prosecutor said in his rebuttal, "We just went on an hour-long red herring fishing trip." (Trial Tr., p. 824, Ls. 2-3.) Alfaro's counsel objected. (Trial Tr., p. 824, L. 4.) Alfaro argues on appeal that the prosecutor's comment was misconduct that infringed on his right to a fair trial. (Appellant's brief, pp. 10-13.) Both parties are given considerable latitude in making closing arguments to the jury. State v. Marmentini, 152 Idaho 269, 271, 270 P.3d 1054, 1056 (Ct. App. 2011). Alfaro argues that the prosecutor exceeded the scope of that latitude. (Appellant's brief, pp. 10-13.) Given the record here, this argument is unsupported by Idaho law.

A. Legal Standard

On appeal, where a defendant asserts prosecutorial misconduct followed by a contemporaneous objection, the appellate court first determines whether the prosecutor's conduct was improper. Id. at 272, 270 P.3d at 1057. If improper, the court evaluates the misconduct for harmless error. Id. An error is harmless if the appellate court finds beyond a reasonable doubt that the error did not contribute to the verdict. Id. (*citing* State v. Perry, 150 Idaho 209, 219-20, 245 P.3d 961, 971-72 (2010)). Where prosecutorial misconduct is of such significance as to impair the defendant's right to a fair trial, it amounts to a constitutional due process violation. Marmentini, 152 Idaho at 271-72, 270 P.3d

at 1056-57 (*citing* Greer v. Miller, 483 U.S. 756, 765, 107 S.Ct 3102, 3108-09 (1987)).

B. Alfaro Has Not Shown That The Prosecutor's Rebuttal Comment Was Either Improper Or Harmful

The Idaho Court of Appeals has found that statements disparaging defense counsel are improper. State v. Gross, 146 Idaho 15, 19, 189 P.3d 477, 481 (Ct. App. 2008). However, comments in rebuttal that characterize defense arguments and theories, but are not directed at defense counsel, are not improper. State v. Norton, 151 Idaho 176, 189, 254 P.3d 77, 90 (Ct. App. 2011). Here, Alfaro contends that the prosecutor committed misconduct when he described defense counsel's closing argument as an "hour-long red herring fishing trip." (Appellant's brief, p. 11; Trial Tr., p. 824, Ls. 2-3.) According to Alfaro, this comment disparages counsel's entire closing argument. (Appellant's brief, p. 11.)

Critically, Alfaro misstates Gross as holding that it is misconduct to disparage defense counsel's *argument*, rather than defense *counsel*. (Appellant's brief, p. 11.) Indeed, the holding in Gross as suggested by Alfaro would be difficult to reconcile with the Idaho Court of Appeals' holding in Norton. But as pronounced by the Idaho Court of Appeals, Gross and Norton are consistent; and under these cases, Alfaro's argument fails.

In Norton, the Court of Appeals held that the prosecutor's references to defense arguments as "red herrings and smoke and mirrors" were not misconduct. Norton, 151 Idaho at 189, 254 P.3d at 90. In so holding, the court

specifically referenced the fact that the comments were not directed at defense counsel personally, but at counsel's theories. Id. Alfaro argues that Norton should be limited to its facts and deemed inapplicable here. (Appellant's brief, p. 11.) To the contrary, Norton controls given the facts here.

As in Norton, the comment challenged by Alfaro was directed at defense counsel's theories presented in closing, and not defense counsel himself. (Trial Tr., p. 824, Ls. 2-3.) Despite Alfaro's suggestion otherwise, the fact that the comments in Norton concerned *some* and not *all* of defense counsel's closing (Appellant's brief, p. 11), is immaterial. The Norton court's holding focused on the *subject* of the disparagement, not the *quantity* of arguments disparaged. Norton, 151 Idaho at 189, 254 P.3d at 90. A holding that attempts to quantify a prosecution's disparagement, as suggested by Alfaro, would be impractical to apply. A simpler reading of Norton, centered on *what* is being disparaged, should govern. Here, because the prosecutor's comment was directed at defense arguments rather than defense counsel, it was not improper.

Finally, the absence of an objection to the prosecutor's comment in Norton does not distinguish it here. The Idaho Supreme Court has held that, absent a contemporaneous objection to the disputed conduct, a defendant must show fundamental error *in addition to* showing that the conduct was improper, and that harm resulted. Perry, 150 Idaho at 219, 245 P.3d at 971. Thus, by failing to object, the defendant in Norton had to show fundamental error as well as impropriety and harm, to establish misconduct. Although the Norton court did not address whether there was fundamental error, it nonetheless concluded that

there was no misconduct. Norton, 151 Idaho at 189, 254 P.3d at 90. Under Norton, whether or not Alfaro objected, the prosecutor's comments were not misconduct.

There being no misconduct, the Court need not address whether there was harm. But even if the Court were to address this question, the overwhelming evidence, as discussed herein, supports that the jury reached its verdict without relying upon the prosecution's comment in closing rebuttal. For these reasons, the Court should reject Alfaro's argument that he was denied a fair trial based on prosecutorial misconduct.

C. Alfaro Has Not Shown Cumulative Error

The accumulation of errors or irregularities that deprives a defendant of a fair trial amounts to a due process violation. State v. Field, 144 Idaho 559, 572-73, 165 P.3d 273, 286-87 (2007). Alfaro raises a cumulative error argument, as an added legal theory, but without additional factual basis. Because Alfaro has not established any errors or irregularities that have deprived him of a fair trial, his cumulative error argument also fails. See Field, 144 Idaho at 572-73, 165 P.3d at 286-87.

III.

Alfaro Has Failed To Establish That The District Court Imposed His Sentence With Intent To Punish Him For Exercising His Right To Trial, Thus Denying Him Due Process

The jury found Alfaro guilty on four counts for which he was charged. (R., pp. 143-45.) On the count of aid and abet first degree murder, the district court sentenced Alfaro to a minimum of 20 years, and a subsequent indeterminate period of life in prison. (R., p. 162.) As to each of the two counts of aid and abet aggravated assault, the district court sentenced Alfaro to five years fixed. (Id.) And on count four, aid and abet unlawful discharge of a firearm at a dwelling house, the district court sentenced Alfaro to five years fixed. The court ordered the sentences to run concurrently. (Id.) Each sentence is squarely within statutory limits. I.C. §§ 18-4004, 19-1430, 18-204, 18-906. Alfaro does not contend otherwise.

Where a sentence is within statutory limits, the appellant-defendant challenging that sentence must demonstrate that the court clearly abused its discretion. State v. Windom, 150 Idaho 873, 875, 253 P.3d 310, 312 (2011) (citation omitted). Alfaro argues that the district court abused its discretion and violated his due process rights by sentencing him more harshly than co-defendants because he exercised his right to trial. (Appellant's brief, pp. 17-18.) In support, Alfaro correctly cites the legal standard in Stedtfeld v. State, 114 Idaho 273, 276, 755 P.2d 1311, 1314 (Ct. App. 1988). But Alfaro then ignores Stedtfeld's analysis and conclusion, which directly apply here.

A. Standard Of Review

A sentencing court cannot impose a harsher sentence on a defendant "for putting the state to its burden of proof and exercising the right to trial." State v. Kellis, 148 Idaho 812, 814, 229 P.3d 1174, 1176 (Ct. App. 2010) (*citing* Stedtfeld, 114 Idaho at 276, 755 P.2d at 1314). To show that due process rights have been violated at sentencing, a petitioner must demonstrate "the judge's vindictiveness or intent to punish him for exercising his rights." Stedtfeld, 114 Idaho at 276, 755 P.2d at 1314 (citation omitted). In determining whether a judge was vindictive in imposing sentence, the reviewing court looks to "the totality of circumstances and examine[s] the words and actions of the judge as a whole." Id.

B. Alfaro Has Not Shown That The District Court Imposed His Sentence Based On An Intent To Punish Alfaro For Exercising His Right To Trial

Alfaro points to no evidence that the district judge intended to punish Alfaro for exercising his right to trial. Indeed, there is no such evidence. Instead, Alfaro notes that the district judge sentenced co-defendant Alaniz to a lesser sentence – a unified term of 15 years with a minimum of six. (Sentencing Tr., p. 30, Ls. 17-25.) However, "a disparity in sentencing among co-defendants in the same criminal activity does not make the harsher sentence *per se* excessive or an abuse of discretion." Stedtfeld, 114 Idaho at 276, 755 P.2d at 1314 (citation omitted). Here, the disparity between Alaniz's and Alfaro's sentences is attributable to the negotiated sentence-reduction for Alaniz's cooperation, not an

improper inflation of Alfaro's sentence for going to trial. (Sent. Tr., p. 32, Ls. 2-24.) Alfaro ignores this; for his argument to succeed, one must ignore it.

Looking at the totality of circumstances, including the court's words and actions as a whole, there is no support for Alfaro's argument that the sentencing court intended to punish him for exercising his right to trial. See Stedtfeld, 114 Idaho at 276, 755 P.2d at 1314. The district court expressed that Alaniz's and Musquiz's bargained-for sentences "did not create a situation of justice." (Sent. Tr., p. 54, L. 25 – p. 55, L. 2.) Contrary to Alfaro's arguments, the court made no comment or even suggestion that the length of Alfaro's sentence was intended to redress the court's frustration over Alfaro's exercise of his right to trial. (Appellant's brief, pp. 17-18.)

The district court expressed concern about how to reconcile the inevitable disparity between Alaniz's and Musquiz's sentences, and Alfaro's sentence. (Sent. Tr., p. 55, Ls. 3-8.) Ultimately, the court imposed Alfaro's 20 year minimum sentence based on the sentencing considerations prescribed by law: protection of society,[1] deterrence,[2] retribution,[3] and even rehabilitation.[4]

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[1] The court addressed societal protection as an overarching concern. (Sent. Tr., p. 55, L. 8 – p. 56, L. 21.)

[2] As to deterrence, "[T]here needs to be a message sent out to these small groups of individuals that live in our community that we cannot allow this to happen." (Sent. Tr., p. 55, Ls. 13-16.)

[3] As to retribution, "It is the most heinous crime . . . and it needs to be treated that way. . . . We're sick and tired of it. And the rest of us that live law-abiding lives in this community cannot be living in fear . . .." (Sent. Tr., p. 55, Ls. 12-18.)

[4] As to rehabilitation, "[Y]ou're 31 years of age. . . .You will be a much younger man than I having served that 20 years. But in this court's view that is a fair sentence giving full regard to the protection of the community, giving full regard to the criteria set forth in 19-2521." (Sent. Tr., p. 56, Ls. 15-21.)

Windom, 150 Idaho at 876, 253 P.3d at 313.

Alfaro has failed to identify any support for his argument that the district court sentenced him as punishment for exercising his right to trial. The Court should therefore reject his final argument.

## CONCLUSION

Alfaro has failed to establish any valid grounds for appeal, thus his appeal must be denied.

DATED this 9th day of January, 2013.

DAPHNE J. HUANG
Deputy Attorney General

## CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 9th day of January 2013, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

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